

The men and women who serve us in uniform, the men and women who serve us in the intelligence agencies, and the civilian employees who come every day to be part of a defense and intelligence structure work hard for America. This bill shows that we appreciate that work. In the Senate today, the overwhelming vote on this bill verifies that, and the President's signature soon to follow will set a blueprint that will allow us to do the No. 1 job of the Federal Government—to defend the United States of America.

I yield the floor.

The PRESIDING OFFICER (Mr. GARDNER). The Senator from Minnesota.

Ms. SMITH. I thank my colleague from Missouri.

#### NOMINATION OF BRETT KAVANAUGH

Ms. SMITH. Mr. President, I rise to talk about my strong opposition to Judge Brett Kavanaugh's nomination to the Supreme Court. I want to specifically focus on what his confirmation could mean for the future of voting rights in this country.

The right to vote is our most sacred responsibility as citizens of this great Nation. Martin Luther King, Jr., called voting "the foundation stone for political action." That is because when the right to vote is restricted, it undermines the very foundation of our democracy. If certain groups are barred or discouraged from voting, then our elected representatives cannot be held accountable for protecting the rights and interests of all of us.

When you cast your vote, you decide who should be entrusted to protect all of your rights—your right to make private decisions about how and when to start a family, your right to organize and advocate for fair pay and safe working conditions, your right to affordable healthcare, and your right to breathe clean air and drink clean water. Yet, if Judge Kavanaugh is confirmed to the Supreme Court, there is no doubt he will help his friends in far-right special interest groups continue their coordinated campaign to make it harder for millions of Americans to vote. These are the very same groups who recommended his nomination to the President.

These special interest groups have helped to pass State laws that have been designed to create obstacles at every step of the voting process, like making it more difficult to register to vote, to cast your vote, and to have your vote counted equally. These groups also know that they can count on Judge Kavanaugh to uphold these discriminatory laws.

As a judge on the DC Circuit Court of Appeals, Judge Kavanaugh has a record of supporting laws that perpetuate voting discrimination, particularly against communities of color. In 2012, he wrote an opinion for a three-judge panel that upheld South Carolina's

stringent voter ID law even though the Department of Justice had determined that the law would violate the Voting Rights Act of 1965.

Unfortunately, discriminatory voting laws, like the one Judge Kavanaugh upheld, have a long and shameful history in this country. When this country was founded, generally only property-owning White men had the right to vote. It took 80 years to expand the franchise to all male citizens regardless of their race or color. It took another 50 years to grant women the right to vote and another 4 years after that to grant that right to all Native Americans. Yet the expansion of the legal right to vote did not always translate into access at the polls. It took us over a century to pass the Voting Rights Act of 1965, which outlawed discriminatory poll taxes, literacy tests, and other voter intimidation tactics. This landmark civil rights legislation finally put real teeth in the promise of the 15th Amendment—that no one should be denied the right to vote on account of one's race or the color of one's skin.

Unfortunately, in 2013, the Supreme Court gutted one of the most important protections of the Voting Rights Act in *Shelby County v. Holder*. Since then, far-right special interests at the State level have doubled down on their efforts to make it harder for people to vote by eliminating same-day and online voter registration, by limiting early voting, by enacting voter ID laws, and by purging infrequent voters from the registration rolls. These latest efforts make it harder rather than easier for people to vote. They show us there is still so much work to be done to fulfill the promise of the 14th and 15th Amendments—that every citizen can vote.

We deserve a Justice who is committed to making our democracy more representative so that we remain a government for the people and not just for some of the people. We need a Supreme Court Justice who appreciates the history of this hard-won fundamental right and who will not reverse course on centuries of progress. Judge Kavanaugh's opinions show that he will uphold State laws that make it harder for communities of color and people of low-income to make their voices heard.

Our voting laws reflect our beliefs about who should have a voice in this country. I am proud to represent Minnesota, the State with the highest voter turnout in the Nation, and I believe that our next Supreme Court Justice should vigorously defend the right of all eligible citizens to exercise their most fundamental constitutional right—the right to vote. Unfortunately, Judge Kavanaugh's record demonstrates he will not be that Justice.

I urge my colleagues to join me in opposing his nomination, and I urge the American people to make their voices heard.

I thank the Presiding Officer.

The PRESIDING OFFICER. The Senator from Utah.

Mr. HATCH. Mr. President, I rise to discuss the nomination of Judge Brett Kavanaugh, as some of my colleagues have been doing today.

President Trump has chosen a superbly qualified nominee to the Supreme Court—and believe me, I know what is good and what isn't good. Judge Kavanaugh is one of the most widely respected judges in the country. He has authored 300 opinions during his 12 years on the bench in the DC Circuit Court of Appeals—the second highest court in the country. The Supreme Court has adopted the positions in his opinions a dozen times. He has written multiple dissents that have carried the day in the Supreme Court. He has authored articles in the *Harvard Law Review*, the *Yale Law Journal*, and the *Georgetown Law Journal*. He has also taught courses at Harvard, Yale, and Georgetown. None other than Elena Kagan, in fact, hired him to teach at Harvard.

I would like to take some time today to focus on a subject on which Judge Kavanaugh has really made his mark as a jurist. I want to talk about substance. I want to talk about what Judge Kavanaugh has written in his opinions and how he has been a true intellectual leader on the court. I hope my colleagues on both sides listen to this because we haven't had a nominee like him in a long time.

So much of the discussion about Judge Kavanaugh, so far, has been substance-free. Democrats have hurled accusation after accusation that has been divorced from reality. They say those who support Judge Kavanaugh are complicit and evil. They say his nomination threatens the destruction of the Constitution. They say people will die if he is confirmed. Lost in all of this is any actual discussion of Judge Kavanaugh's written opinions, of the way he approaches cases.

When Judge Kavanaugh met with me last month, he said he hoped my colleagues would read his opinions. That is how they can learn what kind of a judge he is. That is how they can learn how he thinks. That is how they can learn why he is so respected by Democrats and Republicans alike who are on the circuit courts of appeals and who hold other judgeships.

Regrettably, my Democratic colleagues have been too busy one-upping each other's apocalyptic rhetoric to take a look at what Judge Kavanaugh has actually written, so I would like to take some time to do that today. I would like to focus in particular on the subject on which Judge Kavanaugh has arguably had his greatest influence as a judge—the separation of powers.

The separation of powers is a core component of our Constitution. It is, in fact, the first and the most important way the Constitution protects our liberty.

Justice Scalia was fond of saying that "the genius of the American constitutional system is the dispersal of

power.” By separating authority among competing branches of government and then further dividing it between the Federal Government and the States, the Constitution makes it extremely difficult—indeed, nearly impossible—for any one individual or faction to consolidate enough power to truly threaten liberty. The side effect, of course, is a degree of inefficiency because you must get so many people with so many divergent interests to agree in order to enact lasting changes.

Polymaking can be a messy, slow process, but that was the point. By creating multiple power centers, the Founders ensured that no one person or group could exercise too much power.

Sometimes we forget that the purpose of the separation of powers is to protect liberty. We get frustrated with the slow pace of legislation, and so we want to give more power to the executive branch because the President can act more quickly than a large, multi-member body like Congress. Yet we do not want to give the executive branch too much power because the President might not always be of our same party. So we create these weird hybrids called agencies that, like Congress, create rules for people to follow but that, like the President, are able to act quickly when necessary. Also, like the President, these agencies decide when and how to enforce the law. They decide when to bring suit or when to levy penalties for violations of agency rules. They exercise significant power over our lives, and they don't fit neatly within the constitutional design because they partake of all three branches of government.

Judge Kavanaugh sits on the U.S. Court of Appeals for the DC Circuit, often called the second highest court in the land. The DC Circuit enjoys this esteemed position because it hears many of the cases that involve these agencies that I have just described.

Federal agencies have significant power over many aspects of our lives, and the DC Circuit has authority to review the actions of nearly every Federal agency—important parties, important court.

Judge Kavanaugh's central contribution to separation of powers jurisprudence has been his commitment to upholding the structure of our constitutional design against misguided efforts to insulate agencies from political accountability.

I described earlier how agencies are these weird hybrids. Like Congress, they make laws in the form of regulations. Like the President, they enforce those laws. Like the judiciary, they adjudicate disputes that arise under those laws, the very same laws they wrote in the first place. It is a recipe for abuse if not kept under control. That is why Judge Kavanaugh has been so careful to scrutinize agency design and agency decision making to ensure that officials have the necessary accountability. Accountability is what keeps these agencies in check, given

that the traditional separation of powers, which is what keeps our three branches of government in check, does not apply.

In only his second term on the DC Circuit, Judge Kavanaugh authored a masterful dissent in *Free Enterprise Fund v. Public Company Accounting Oversight Board*. The Public Company Accounting Oversight Board was a newfangled agency that Congress created in 2002 in the Sarbanes-Oxley Act. The Board has broad authority to regulate audits of public companies and oversees the registration and inspection of audit firms. It also sets audit standards and brings enforcement actions against violators. It is, in short, a very important agency.

The problem with the Board was that Congress had chosen to completely insulate it from political accountability. Board members are not chosen by the President. They are chosen by the Securities and Exchange Commission, which is, in turn, chosen by the President. Board members cannot be removed by the President. They can be removed only by the SEC, which, in turn, can be removed by the President.

The rub was that Congress had placed strict limits on the SEC's ability to remove Board members and strict limits on the President's ability to remove SEC Commissioners. The Securities and Exchange Commission could remove a Board member only for “good cause shown,” and the President could remove an SEC Commissioner only for “inefficiency, neglect of duty, or malfeasance in office.” So not only could the President not remove a Board member who was doing a bad job, but he also could not remove an SEC Commissioner for refusing to remove a Board member who was doing a bad job unless he could somehow show that the SEC Commissioner's failure to remove the Board member was a neglect of duty.

As Judge Kavanaugh explained:

The President's power to remove is critical to the President's power to control the Executive Branch and perform his Article II responsibilities. Yet under this statute, the President is two levels of [removal limitations] away from Board members. . . . This structure effectively eliminates any Presidential power to control the [Board], notwithstanding that the Board performs numerous regulatory and law-enforcement functions at the core of executive power.

Judge Kavanaugh's logic was inescapable: The President cannot do his job if he cannot control his subordinates, and he cannot control his subordinates if he cannot remove them from office. The structure of the Public Company Accounting Oversight Board made it immune from Presidential control and, thus, immune from political accountability. Here, you had an agency exercising executive power with no oversight from the Chief Executive himself. This is contrary to the separation of powers, which vests executive authority in the President precisely because the President is a politically accountable actor.

As Justice Jackson memorably taught, the power to enforce the law is among the most awesome of powers granted to government. By cutting off the exercise of executive power from Presidential oversight, the Board's structure violated the Constitution.

Although Judge Kavanaugh's position was the minority view among his DC Circuit colleagues, his position ultimately prevailed at the Supreme Court. It was a significant victory for a young judge and a sign of things to come.

Over the next decade, Judge Kavanaugh continued to uphold the separation of powers in a range of cases that called on him to interpret the scope of agency authority. He brought a discerning eye to these cases, always careful to ensure that agencies did not act beyond the powers Congress had granted them.

In *Loving v. Internal Revenue Service*, for example, he rejected an effort by the IRS to stretch the words of a statute authorizing the IRS to regulate the practice of “representatives of persons before the Department of the Treasury” to include the authority to regulate tax preparers.

Similarly, in *White Stallion Energy Center v. EPA*, Judge Kavanaugh concluded that the EPA contravened the Clean Air Act when it refused to consider costs in setting air quality regulations. This was yet another case in which Judge Kavanaugh's position ultimately prevailed at the Supreme Court itself.

Of course, Judge Kavanaugh's searching review doesn't mean that agencies always lose. In *American Trucking Association v. EPA*, for instance, he upheld the EPA decision to authorize a State emissions rule over a vigorous dissent because he concluded the Agency had met the statutory requirements in rendering its decision.

The key is that Judge Kavanaugh reviews agency action carefully to ensure that it conforms to Congress's commands. This is an essential aspect of the separation of powers. Congress determines the limits of agency authority. Congress sets the rules for when agencies may and may not act and for what they may and may not do. That is the very essence of legislative power—the power to set the rules that others must follow.

When agencies transgress the bounds Congress has laid down, they exercise power that no one has granted them, power that Congress alone can give.

Judge Kavanaugh returned to the theme of agency accountability and the separation of powers in another powerful dissent earlier this year. The case is *PHH Corporation v. CFPB*, and it is another tour de force for Judge Kavanaugh.

At issue in the case is the structure of the Consumer Financial Protection

Bureau, or CFPB. The CFPB is an incredibly powerful agency with vast authority over American life. Its jurisdiction includes banks, credit unions, securities firms, payday lenders, mortgage servicers, and an array of other financial services companies.

When Congress created the CFPB in the 2010 Dodd-Frank Act, it placed strict limits on the President's ability to remove the agency's head. Specifically, Congress provided that the President may remove the CFPB Director only for "inefficiency, neglect of duty, or malfeasance."

You may recall that language from my discussion of the Free Enterprise Fund case. It is the same restriction that Congress placed on the President's ability to remove SEC Commissioners, but there is a significant difference between the SEC and the CFPB.

The SEC is a multimember body. It cannot act without the agreement of a majority of Commissioners. The CFPB, by contrast, is a unitary body. It has a single Director. The only person the CFPB Director has to agree with is himself. Coupled with the fact that the CFPB is an incredibly powerful agency whose funding isn't even directly controlled by Congress, this raises serious separation of powers concerns.

An agency head who can do virtually whatever he wants without fear of Presidential reprimand, and who can do it on his own without having to get the consent of fellow Commissioners, is accountable to no one. The President cannot check him. His colleagues cannot check him. In a very real sense, he is a law unto himself.

Judge Kavanaugh's dissent confronts this problem head-on in its very opening lines:

This is a case about executive power and individual liberty. To prevent tyranny and protect individual liberty, the Framers of the Constitution separated the legislative, executive, and judicial powers of the new national government. To further safeguard liberty, the Framers insisted upon accountability for the exercise of executive power. The Framers lodged full responsibility for the executive power in a President of the United States who is elected by and accountable to the people.

Judge Kavanaugh then eloquently explains how the CFPB's structure and limits on Presidential oversight violates these core principles. He said:

The Director of the CFPB wields enormous power over American businesses, American consumers, and the overall U.S. economy. . . . The Director alone may decide what rules to issue. The Director alone may decide how to enforce, when to enforce, and against whom to enforce the law. The Director alone may decide whether an individual or entity has violated the law. The Director alone may decide what sanctions and penalties to impose on violators of the law. Because the CFPB is an independent agency headed by a single Director and not by a multi-member commission, the Director of the CFPB possesses more unilateral authority—that is, authority to take action on one's own, subject to no check—than any single commissioner or board member in any other independent agency in the U.S. Government.

And then Judge Kavanaugh drops the hammer. He said:

[O]ther than the President, the Director enjoys more unilateral authority than any other official in any of the three branches of the U.S. Government. That combination—power that is massive in scope, concentrated in a single person, and unaccountable to the President—triggers the important constitutional question at issue in this case.

Judge Kavanaugh eloquently explains how the CFPB's structure, coupled with the agency's complete lack of accountability, poses a threat to individual liberty. The CFPB wields enormous power and yet is accountable to no one—not the President, not the Congress, not the American people.

The central purpose of the separation of powers is to prevent any one individual group from wielding too much power. It does this by dispersing authority and by playing the branches off of each other. But the CFPB's structure does not disperse power. It consolidates power, and it does so in a single individual who has no superior. This is a textbook violation of the separation of powers and one that I fully expect the Supreme Court to correct if it hears this particular case.

I have spoken at length today about Judge Kavanaugh's writing and jurisprudence. I focused on actual cases that he has decided and on his important contributions to constitutional law.

In short, I have done what Judge Kavanaugh asked me to do. I have reviewed his opinions and considered his analyses. I have done what all of my colleagues should be doing. We should be reading what Judge Kavanaugh has actually written. We should be looking at his judicial philosophy and how he decides cases.

Judge Kavanaugh is an outstanding choice for the Supreme Court. His opinions are cogent, his writing eloquent, and his reasoning ironclad. He understands that the purpose of the Constitution is to preserve liberty and that the Constitution does so both through the substantive guarantees in the Bill of Rights and reconstruction amendments, and through the structural protections in articles I, II, and III of the Constitution.

Congress may from time to time experiment with new ways of delegating authority or structuring agencies, but it cannot do so in ways that violate our Constitution's separation of powers. Individuals who exercise Executive power must be accountable to the President. Agency officials cannot be fully insulated from Presidential oversight. A person who has power to regulate broad swaths of our Nation's economy must have some checks on his or her authority. This is a requirement for our system of government. It is a requirement of our Constitution, and it is essential to the preservation of liberty.

Judge Kavanaugh understands this. He understands the Constitution. He understands the proper role of a judge. He is one of the most brilliant and most distinguished legal thinkers in our country today. I am proud to support his nomination to the U.S. Su-

preme Court, and I urge all of my colleagues to support him as well.

We have to get away from the politics of the Supreme Court. When we have someone who has the qualities, the ability, the reputation, and the historicity of doing what is right on the bench, we should give that person an opportunity to serve.

Judge Kavanaugh deserves an opportunity to serve. He has more than adequately proved that he deserves it. We are going to be lucky to have him on the U.S. Supreme Court.

I am not sure that he is always going to rule the way I want him to rule, either, but nobody does, and from time to time, we may be disappointed. But the fact is that I know one thing: He is going to apply the best of legal knowledge to the opinions that he writes, and he will be a force on the Court who will get along with the other Justices by showing mutual respect for them and receiving mutual respect back from them.

Judge Kavanaugh is the type of guy who really will make a tremendous difference for our country. He deserves this appointment. We need to sustain him and support him, and we need to get the politics out of this nomination.

We are lucky that he is willing to serve. I believe that almost everyone in this body will henceforth, once he is confirmed, come to the conclusion that we are really lucky to have him as a Justice on the U.S. Supreme Court.

I yield the floor.

The PRESIDING OFFICER. The Senator from Ohio.

#### PENSIONS AND THE CFPB

Mr. BROWN. Mr. President, I will start by thanking Senator HATCH. He and I are cochair of the Pensions Committee. We had a commitment, and we had a good meeting in his office last week. We had a good discussion and hearing in our joint committee; we have four Republicans and four Democrats from each House solving what looks to some to be an intractable pension problem.

But if you are one of 16,000 Ohio Teamsters, mine workers, iron workers, carpenters, bakers, and others, it is your life because you put—what this town doesn't always understand on collective bargaining is you give up money today at the bargaining table so you will have a pension later in life; you will have economic security.

In part because of Wall Street shenanigans and other things, these pensions are in jeopardy. They could face up to 60 percent in pension cuts. We also know that a whole lot of businesses, at least 210 in my State alone, could face layoffs or, worse, bankruptcy. Many of them are family-owned transportation and manufacturing and construction companies. They could face very, very dire economic times if Congress doesn't fix that, let alone what is going to happen to the Pension Benefit Guaranty Corporation. I thank Senator HATCH for that.